T.R.W. Bearings Division, a Division of T.R.W., Inc. *and* Laland D. Anderson. Case 10-CA-15080

July 31, 1981

DECISION AND ORDER

On August 8, 1980, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.[3]

The Administrative Law Judge found, *inter alia*, that rule 9 in Respondent's March 1, 1979, "Employee Guide," prohibiting employees from engaging in solicitation or distribution of unauthorized literature during "working hours," is presumptively invalid as being unlawfully broad. In reaching this conclusion, the Administrative Law Judge relied on the general proposition, announced in *Essex International, Inc.*,[4] that rules, such as rule 9 in the instant case, which prohibit solicitation or distribution during "working hours" are presumptively invalid as they are susceptible to the interpretation that such activity is prohibited during *all* business hours, including employees' nonworking mealtimes and breaktimes.

Respondent contended before the Administrative Law Judge, and reasserts in support of its exceptions to the Administrative Law Judge's finding that rule 9 was unlawful, that it rebutted the presumptive invalidity of rule 9 by showing that, in accordance with the requirements set out in *Essex International*, the prohibition against solicitation and distribution during "working hours" was communicated to the employees in such a way as to convey an intent clearly to permit such activity during mealtime or breaktime or other periods when employees are not actively at work.[5]

In this regard, Respondent notes the Board's companion holding in *Essex International*, that rules prohibiting solicitation or distribution during "working time" or "work time" are presumptively *valid*, as connoting only the period of time that is spent in the performance of actual job duties, not including employees' mealtimes or breaktimes when they are free to engage in solicitation or distribution. Here, Respondent points out that since at least August 1, 1978, some 7 months prior to its initial issuance of rule 9 in March 1979, and continuing thereafter at least through the time of the hearing herein in April 1980, it has distributed to its employees an employee handbook which, *inter alia*, prohibits employees from engaging in solicitation for such things as "memberships or other outside activities during *working time*" (emphasis supplied). Moreover, urges Respondent, it reiterated this policy as set out in the employee handbook in an October 1979 posted notice to employees. Thus, Respondent contends that its August 1978 prohibition against solicitation during "*working time*," and its October 1979 reiteration of that "working time" prohibition, made it clear to the employees that its March 1979 "working hours" prohibition did not preclude them from engaging in solicitation and distribution of literature when not actually engaged in work.

The Administrative Law Judge, for the reasons set out in section III,A, of his Decision, failed to find that the presumptive invalidity of the "working hours" prohibition in rule 9 had been rebutted, and he therefore concluded that rule 9 was violative of Section 8(a)(1) of the Act.

We agree with and affirm the Administrative Law Judge's conclusion that Respondent's rule 9 violates Section 8(a)(1) of the Act. We reject, as did the Administrative Law Judge, Respondent's contention that the presumptive invalidity of rule 9's prohibition against solicitation and distribution during "working hours" was rebutted by Respondent's prior and subsequent publication of a presumptively valid rule prohibiting solicitation during "working time." However, unlike the Administrative Law Judge, our rejection of Respondent's claim of rebuttal is based not on the particular circumstances outlined by the Administrative Law Judge, but instead on our rejection of the principle, espoused in *Essex International*, that prohibitions against solicitation and distribution during "working time" or "work time" are presumptively valid.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[3] In par. 2(a) of his recommended Order, the Administrative Law Judge inadvertently omitted a portion of the reinstatement language traditionally used by the Board. Accordingly, we shall modify the recommended Order to correct this error.

[4] 211 NLRB 749 (1974) (then Member Fanning and Member Jenkins dissenting).

[5] *Id.* at 750.

As noted above, the majority in *Essex International* held that rules which prohibit solicitation and distribution during "working time" are presumptively valid, but that rules prohibiting solicitation and distribution during "working hours" are presumptively invalid. The latter presumption, however, could be overcome in any particular case by a presentation of extrinsic evidence that such "working hours" rules were communicated or applied in such a way as to convey an intent clearly to *permit* solicitation during breaktime or other periods when employees are not actually at work. These conclusions concerning the distinctions between "working time" and "working hours" were predicated entirely upon what the *Essex International* majority saw as the "clear distinction" to be drawn between the terms; that is, "working hours" connoted the period of time from the beginning to the end of a workshift, including breaktime and mealtime, while "working time," on the other hand, connoted only the period of time that is spent in the performance of actual job duties, thereby excluding breaktime and mealtime from its scope.

We, however, see no inherent meaningful distinction between the terms "working hours" and "working time" when used in no-solicitation rules. Both terms are, without more, ambiguous, and the risk of such ambiguity must be borne by the promulgator of the rule. Either term is reasonably susceptible to an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods). As such, either term tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights.

Inasmuch as employees may rightfully engage in organizational activities during breaktime and mealtime, rules which restrain, or which, because of their ambiguity, tend to restrain employees from engaging in such activity constitute unlawful restrictions against and interference with the exercise by employees of the self-organizational rights guaranteed them by Section 7 of the Act.[6] As pointed out in the dissenting opinion in *Essex International*, an employer who does not intend that its employees misinterpret rules against solicitation during "working time" or "working hours" in the unlawfully broad sense described above need only incorporate in the rule itself a clear statement that the restriction on organizational activity contained in the rule does not apply during break periods and mealtimes, or other specified periods during the workday when employees are properly not engaged in performing their work tasks.

In view of the foregoing, we hold that rules prohibiting employees from engaging in solicitation during "work time" or "working time," without further clarification, are, like rules prohibiting such activity during "working hours," presumptively invalid.[7]

We are, of course, aware that Respondent's prohibitions against solicitation during "working time" were not alleged in the complaint to be unlawful. Nor has Respondent otherwise been put on notice that the presumptive lawfulness of those prohibitions was to be challenged or otherwise litigated. Consequently, we shall not conclude, in this proceeding, that the prohibitions against solicitation contained in Respondent's employee handbook and its October 1979 notice are in violation of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, T.R.W. Bearings Division, a Division of T.R.W., Inc., Flowery Branch, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(a):

"(a) Offer Laland Anderson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his discriminatory discharge in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

[6] See *Avon Convalescent Center, Inc.*, 200 NLRB 702, 704–705 (1972), enfd. 490 F.2d 1384 (6th Cir. 1974); see also the dissenting opinion of then Member Fanning and Member Jenkins in *Essex International, supra.*

[7] To the extent that *Essex International, supra*, and subsequent cases relying on it have held that rules prohibiting solicitation or distribution during "work time" or "working time" are presumptively valid, those cases are hereby overruled.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me at Gainesville, Georgia, on April 30, 1980, pursuant to charges filed against T.R.W.

Bearings Division, a Division of T.R.W., Inc.,[1] on October 2, 1979, and a complaint issued on November 13, 1979.[2] The complaint alleges the unlawful discharge of Laland Anderson and threats, interrogation, and unlawful employee rules.

Upon the entire record and my observation of the demeanor of the witnesses, with due consideration of the parties' briefs, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is an Ohio corporation with an office and place of business located at Flowery Branch, Georgia, where it is engaged in the manufacture of roller and ball bearings. Respondent, during the calendar year preceding the issuance of the complaint, a representative period, sold and shipped from its Flowery Branch, Georgia, facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, is a labor organization with the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Company Rules*

An "Employee Guide" setting forth work rules and the penalties for violations thereof has been in effect at Respondent's Flowery Branch, Georgia, facility since March 1, 1979, and is yet distributed to new employees. The General Counsel contends that the promulgation and maintenance of two of these rules violated Section 8(a)(1) of the Act. Inasmuch as the promulgation of the "Employee Guide" occurred more than 6 months prior to the filing of the charge herein, it may not be found violative of the Act. The issue is therefore whether the maintenance and distribution of the two rules in question is unlawful. They read as follows:

> 9. Soliciting, politicking or distributing unauthorized literature during working hours or at work station without permission.
>
> 12. Displaying of unauthorized posters, signs and other visuals.

The "Guide" in evidence from which these rules were extracted bears a revision date of October 1, 1979, and there is no evidence these rules were ever explicitly retracted.

Since at least August 1, 1978, Respondent has also distributed an employee handbook, being revised at the time of the hearing, which contains the following statement:

> SOLICITATIONS
>
> No members will be allowed to engage in solicitation for such things as subscriptions, memberships or other outside activities during working time. Any employee who does so and thereby interferes with his own work or the work of another employee during that employee's working time will be subject to discipline, including discharge.
>
> In addition, there will be no distribution of literature or other printed matter at any time on company property in the working areas of the plant by any employee nor will there be any distribution of literature on company property by anyone not employed by the company.
>
> The only exception to this rule will be solicitation for recognized charities such as United Fund, in which case special arrangements will be approved and posted.

In October 1979, Respondent posted the following pursuant to its established question-and-answer program:

> Q. Some are wearing things handed out by the IAM. I heard you are going to stop this. What about it?
>
> A. No. Our work rules only preclude wearing anything that would be a safety factor—see rules of class A/5 step procedure.[3]
>
> Further, our policy generally states that unless something (1) interferes with his own work or (2) the work of another employee during the employees working time he will not be subject to discipline for these kind of things.

The policy in its entirety says:

> No members will be allowed to engage in solicitation for such things as subscriptions, memberships or other outside activities during working time. Any employee who does so and thereby interferes with his own work or the work of another employee during that employee's working time will be subject to discipline, including discharge.
>
> In addition, there will be no distribution of literature or other printed matter at any time on company property in the working areas of the plant by any employee nor will there be any distribution of literature on company property by anyone not employed by the company.
>
> The only exception to this rule will be solicitation for recognized charities such as United Fund, in which case special arrangements will be approved and posted.

I am persuaded that the issuance of the March 1979 "Employee Guide" reasonably tended to convey to Respondent's employees that the rules therein were the ones then in effect and were to be followed. The introduction to this "Guide" states, in pertinent part:

[1] Respondent's name appears as corrected at the hearing.

[2] All dates herein are in 1979 unless otherwise specifically stated.

[3] Rules 9 and 12 above appear in the "Employee Guide" under the general heading "Class A/5 Step Procedure."

This pamphlet has been prepared to provide all employees a set of Standard Work Rules which identify (1) Work Responsibilities, (2) Standards of Conduct, and (3) Appropriate Disciplinary Procedures for Infractions of Either. They are asceptable to amendment as greater wisdom or additional needs may arise.

Its purpose is to remove inconsistencies and inequities in our disciplinary structure. Inconsistencies and inequities in the disciplinary structure create counterproductive responses and reactions within an organization and cannot be tolerated.

These standards were developed through common usage and common sense and must be observed out of consideration for the rights of others and efficiency of a business operation.

* * * * *

Although most employees observe these standards as a matter of course, they are listed here to clearly state what is expected of Marlin-Rockwell Gainesville employees and to define and protect the rights of all who work here.

Probationary employees (individuals at pay Level 1) are subject to discharge whenever it is determined that their performance and/or attitude is not satisfactory.

In my view, this introduction put employees on notice that the rules in the "Employee Guide" were in full force and effect and superseded previously existing rules, including those in the employee handbook. The republication of the handbook policy on solicitation, via Respondent's question-and-answer format, did not on its face retract the "Guide" rules and the evidence shows that Respondent still purports to follow the disciplinary rules and procedures in the "Guide." Respondent's October posting of the question and answer set forth above may have served to foster uncertainty among the employees regarding the viability of the rules laid out to them in the "Employee Guide," but it was insufficient to dissipate employee reliance on these rules which continued to be distributed. I do not believe that employees are required to resolve ambiguities created by their employer, nor do I believe that it can reasonably be concluded that Respondent's posting, in response to an inquiry on wearing union insignia, communicated to employees that they could safely disregard the solicitation and distribution provisions of the "Employee Guide" whose introduction positively directs employees to follow those provisions or suffer discipline for infractions thereof. Whatever Respondent's subjective intent was in republishing the handbook provisions on "Solicitations," it cannot be reasonably concluded on the evidence before me that this republication fairly notified employees that "Employee Guide" rules 9 and 12 above had been modified or rescinded. Accordingly, I conclude these rules retain their vitality to the present.

With respect to rule 9, it is well established that a rule prohibiting employees from soliciting or distributing during "working hours" is *prima facie* too broad.[4] The mere existence of so broad a rule tends to restrain and interfere with employee rights protected by the Act, without need of any showing that the rule was ever enforced.[5] I therefore find that rule 9 has been and is being maintained and distributed by Respondent in violation of Section 8(a)(1) of the Act.

As to rule 12, it is settled that employees have a protected right to display as well as possess union materials at their place of work.[6] Moreover, review of such materials by management prior to its distribution is obviously encompassed in the term "unauthorized" used in rule 12. Predistribution clearance by management of union literature has been found unlawful,[7] and it would seem the same result is applicable to predisplay clearance. There is no evidence that rule 12 was required to guard against interference with production or discipline. Accordingly, although I do not agree with the General Counsel that rule 12 prohibited employees from wearing or displaying union insignia on their person in view of the evidence that a number of employees did wear such paraphernalia without restriction or discipline therefor, I find that rule 12 has a clear tendency to inhibit the protected display of union materials, and the continued maintenance and distribution of this broad rule violates Section 8(a)(1) of the Act.

B. *The Discharge of Laland Anderson and Certain Allegations of 8(a)(1) Violations*

General Context

Organization on behalf of the Union commenced in late July among Respondent's employees. Laland Anderson and his brother made the first employee contact with the Union and thereafter Laland Anderson solicited about 30 to 35 union authorization cards from Respondent's employees in August. He was terminated on September 19. The Union, on October 3, petitioned for a Board-conducted election. An election was held on November 30, and the Union lost.

About mid-August,[8] Laland Anderson asked Plant Manager Nunn for permission to change his work schedule so he could attend his son's high school football games. Nunn referred him to Unit Manager Campbell for approval of this request. Campbell asked Anderson if his request was an act of harassment of management because of the Union.[9]

On or about September 6, employee Walter Chambers stabbed a screwdriver through employee Tim Payne's toolbox. Anderson witnessed him so doing. Respondent's disciplinary rules provide for termination of employment for the first infraction of the rule forbidding "Abusing and/or wilfully damaging/destroying employee personal

[4] *Essex International, Inc.*, 211 NLRB 749 (1974). There is no showing of persuasive business justification for such a broad rule.

[5] *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

[6] *Dillinham Marine and Manufacturing Co., Fabri-Valve Division*, 239 NLRB 904 (1978).

[7] *McDonnell Douglas Corporation*, 240 NLRB 794 (1979).

[8] I credit Anderson on the approximate time of this occurrence.

[9] Campbell denies mentioning the Union, but I credit Anderson, the more believable of the two on this point.

property or company property." The toolbox was company property.

In investigating this incident, Respondent was told by Payne that one Ross and he had exchanged opposing views about the Union, Ross being for and Payne against, prior to the incident, and that after the incident Ross asked Payne if he had changed his mind. Ascertaining that Anderson had been a witness to the toolbox stabbing, Campbell and Shift Manager Patterson questioned him about it. I credit Anderson that Campbell asked him if the damage was union harassment, and said that if he could prove it related to the Union or that Anderson had done it Campbell would fire him. Anderson refused to say who had done the deed. Anderson was called into Nunn's office, where Nunn asked him if the incident had anything to do with the Union, received a negative answer, and went on to say that it looked like harassment because of the Union to him.[10] Anderson still would not inform.

The following day, Chambers, who had previously denied to Patterson that he had done it, confessed to Patterson and Campbell, with the explanation he had had a bad day and stabbed the box, according to Campbell, in a "fit of passion." In the course of his confession Chambers said he was not crazy about the Union. Campbell reported Chambers' admission to Nunn who instructed Campbell to discipline Chambers. Chambers received a written reprimand and was sent home 2 or 2-1/2 hours early, but was paid for this time off from work.

On September 17, the plant fire alarm went off due to an opened valve on the sprinkler system. Anderson and employee Joel Odom had been seen in the immediate vicinity of the valve in question shortly before the alarm went off. Campbell interrogated both employees, in Patterson's presence, and both denied opening the valve. I credit Anderson's testimony that Campbell made it known that he suspected the incident to be an act of union harassment, but I do not credit the testimony of Odom that Campbell said he would fire the two if the incident or they had anything to do with the Union because it seemed to me as Odom testified that he was expressing his understanding of Campbell's intent rather than what Campbell actually said.

On September 25, Anderson, as a practical joke, caused Patterson to be paged to the heat treat roof. Anderson denied to Patterson that this paging had been at his instigation. Within an hour of the incident Campbell suspended Anderson, who had by then admitted his act, until the next day when he was to meet with Nunn on the matter.

Anderson met with Nunn and Campbell on September 26. Nunn testified that he reviewed Anderson's record prior to meeting with him and noted an absence problem and poor work performance. I credit Anderson that Nunn told him, after Anderson apologized for the paging incident, that he was not firing Anderson for that reason but he had noted Anderson had five unexcused absences. Anderson protested to Campbell, also present, that this was wrong but he might have five incidents of unexcused tardiness. Campbell responded that it was the same thing and Anderson had five unexcused absence days. Anderson had, on May 7, been counseled about unexcused tardiness,[11] and I conclude, in the absence of evidence to the contrary, that he had no absentee problem other than some tardiness preceding May 7, which has not been shown to have continued thereafter. Respondent proffered no attendance record on this subject to contradict Anderson and this supports my conclusion. Nunn then had a private discussion with Campbell, who urged discharge, and returned with Campbell to tell Anderson he was discharged.

Nunn testified that he discharged Anderson for insubordination. The documentation of the discharge signed by both Campbell and Nunn on September 26 states the offense as "Insubordination to Immediate Supervisor," and explains "Laland used the paging system to page Paul Patterson to heat treat rush when Paul was not needed in heat treat. Laland denied he paged Paul." On October 2, Respondent issued a separation notice on a form provided for issuance to employees by the State of Georgia Department of Labor Employment Security Agency. The reason for separation stated on the form by Respondent is "Employee was terminated due to being uncooperative."

Respondent's efforts to explain in what way Anderson was insubordinate are confused and unbelievable. Nunn explained that "uncooperative" on the state form means insubordination, insubordination includes attempting to harass management, and an employee who refused to follow company policy would be uncooperative. He then further explained:

> Q. Now you have already told me that you fired Mr. Anderson for insubordination?
>
> A. Insubordination, yes, ma'am.
>
> Q. I would like for you to explain specifically why Mr. Anderson was fired.
>
> A. Well, Mr. Anderson was fired because he picked up the telephone, called the maintenance office where they have a microphone and said, "Page Paul Patterson, come to heat treat roof or rush immediately." Mr. Patterson went out there and there was nothing wrong and when you page somebody to heat treat in the rush or to the roof it either means you have got a fire or an imminent explosion.
>
> Q. Okay, and is that the reason that you discharged him?
>
> A. Yes, it is.[12]

Campbell testified:

> JUDGE WOLFE: . . . if I understand correctly, you recommended to Mr. Nunn that Mr. Anderson be discharged?

[10] I credit Anderson's version, noting that Nunn concedes he told Anderson he took the incident seriously "for one reason only" because if it involved harassment of Payne for his point of view he did not like it and would stop it. Nunn was plainly talking about Payne's union views.

[11] The May 7 counseling report specifically notes that it was not a "write-up" but was to serve as constructive criticism.

[12] I am not convinced that the page to the roof by Anderson was construed as a fire or imminent explosion. There is no persuasive evidence Patterson had reason to so construe it.

THE WITNESS: Yes.

JUDGE WOLFE: What reason did you represent to Mr. Nunn?

THE WITNESS: For insubordination and harassment of his second shift, shift manager.

The reason for calling him to the heat treat department when he did not need him and from the standpoint that he lied to his shift manager when he was asked about it and then said to me when I was subsequently questioning him about the fact that he only did it as a joke.

JUDGE WOLFE: Okay, but in any event, the basic reason you state was insubordination with regard to who, Mr. Patterson?

THE WITNESS: Yes, sir.

JUDGE WOLFE: Now, if you will explain to me, perhaps I am a little thick but I have had trouble all day long on this; how does this "harassment" constitute insubordination? I am not trying to argue, I just want to know why you call it insubordination?

THE WITNESS: It is my opinion, sir, that if an employee does anything that, or refuses to do anything, or in fact when he does something that appears to be harassment of management and then denies the fact, and then after he does admit the fact, he twists the story in some fashion, and then says that it is only a joking matter, to me I question the fact of his responsibility to himself and to the company.

* * * * *

Q. (By Ms. Lieberwitz) You have certain company rules and policies that employees must follow, isn't that true?

A. Yes, ma'am.

Q. Would you consider an employee insubordinate if he did not follow company policy?

A. I think it would probably depend on the circumstances, that is a hard question for me to answer, I don't really know.

Respondent claims the discharge was required by the Company's rules and points to three other discharges for "insubordination" to support its position that "insubordination is seen to be any form of obstinate or uncooperative behavior and is not merely a refusal to follow supervisory instruction." Respondent's effort is not persuasive. One of these three dischargees refused a direct order to work; another made an obscene gesture to his supervisor in response to an order; and the third intentionally missed work in order to work at a second job. I do not see how the third employee was insubordinate, but the other two plainly were in the usual sense of the word.

According to Respondent's written rules, insubordination is a type of violation which "will" result in discharge for the first infraction. The offense itself is set forth in the "Employee Guide" as follows:

> 4. Insubordination to supervisory personnel, i.e., refusal to carry out a direct, reasonable order from immediate supervisor that poses no threat to safety or health.

Respondent's theme throughout the hearing was that Anderson was insubordinate because he was "harassing management." To support this hypothesis, Respondent dwelt long on Anderson's refusal to inform in the toolbox incident; the fire alarm incident which admittedly cannot be proved the result of any act by Anderson; the paging of Patterson; and the use of company phones for personal long-distance calls. None of these incidents amounts to insubordination in my view, and Respondent's strained contentions that Anderson was harassing management, therefore was uncooperative, and was therefore insubordinate are neither logical nor persuasive. Nothing chargeable to Anderson warrants discharge under Respondent's own rules. Both the paging incident and the use of phones for private use fall within the rule against "Misuse of inhouse phones and/or paging system" for which there is five-step progressive discipline consisting of an (1) oral warning, (2) a written warning, (3) a written reprimand, (4) 1-week suspension without pay, and (5) termination for the fifth infraction. The discharge of Anderson for the first infraction was plainly unwarranted. Moreover, if the paging incident be construed as "horseplay," Respondent's rules provide for 2 weeks' suspension for the first infraction and termination for the second within a 12-month period. This rule was plainly not applied to Anderson. Further, assuming *arguendo* that Anderson had a poor attendance record and failed to follow supervisory instructions, thus being uncooperative, he would be entitled under Respondent's rule covering these violations to a written warning, a written reprimand, and a 2-week suspension for the first three infractions before being terminated for the fourth offense. There is no company rule applicable to any of Anderson's alleged misconduct which calls for discharge instanter. I am convinced Respondent seized on "insubordination" as a pretext to accomplish the discharge of a leading union adherent. That Respondent knew Laland Anderson was a union activist and was hostile to such activities is readily inferable from its repeated accusations to him, commencing in August, that he was engaging in union-inspired harassment of the company, a peculiar obsession of Respondent not shown to be grounded on any reasonable foundation. The evidence indicates to me that it was Respondent, rather than Anderson, who was engaged in acts of harassment for the purpose of constructing some colorable reason to discharge him. Thus, (a) Campbell attempted to convert an innocent request for shift change to union harassment; (b) Anderson's refusal to inform on Chambers was twisted into obstinate behavior supportive of the ultimate conclusion of uncooperation equalling insubordination; (c) the suspicion that Anderson or Odom may have opened the valve causing the fire alarm to go off ripened into a conclusion of union harassment equivalent to insubordination; and (d) Anderson's misuse of the paging system warranting nothing more than an oral warning for this first infraction, according to Respondent's own rules, suddenly became insubordination warranting immediate discharge. The insertion of Anderson's misuse of company phones for personal use, which he had agreed to pay for prior to his discharge, and his attendance record is transparent

makeweight designed to show what an unsatisfactory employee Anderson was, and indicates the absence of any supportable lawful cause for the discharge.

In addition to my conclusion that the reasons advanced for the discharge are transparently pretextual and warrant an inference of unlawful motivation,[13] the treatment of Anderson is in marked contrast to that of Chambers, who advised Respondent he was not crazy about the Union. Chambers committed an offense against property clearly warranting immediate discharge under Respondent's rule; first denied before admitting the deed; and then was given only a reprimand on the specious ground that his destructive act was excusable because he had a bad day, was upset, and acted in a "fit of passion." His 2- or 2-1/2-hour layoff was in the nature of rest and recreation rather than discipline because he was paid for this time off, hardly a penalty. This treatment of Chambers, not crazy about the Union, illustrates to my satisfaction that stringent enforcement of its rules was undertaken by Respondent on a selective basis to suit its own purposes, and the convoluted reasoning employed to subject Anderson to discharge was designed to construct an excuse to get rid of him because of his extensive union activity, whereas it was deemed desirable to excuse Chambers in view of his, at most lukewarm, attitude toward the Union. Moreover, Campbell's advice to Anderson that he would be fired if he had damaged the toolbox or if the damage was attributable to union activity reveals that Respondent's criteria for discharge incorporated union activity as a controlling factor, and also constitutes a threat of discharge for engaging in union activity which violates Section 8(a)(1) of the Act.

I conclude and find that Anderson was discharged in order to discourage employee union activity and his discharge therefore violated Section 8(a)(3) and (1) of the Act. Further, I find the question put to Anderson by Campbell in August as to whether his request for shift change was a type of union harassment amounted to unlawful interrogation with respect to his union activities and violated Section 8(a)(1) of the Act.[14] Campbell had no colorable reason, other than a search for information about union activities, to posit union harassment as a legitimate subject of inquiry. Similarly, the statements of Nunn and Campbell, on and after September 6, that they suspected union harassment in the toolbox and fire alarm incidents, were hardly warranted by the mere report that Ross had asked Payne, after the toolbox stabbing, if he had changed his mind about the Union. The Chambers' confession made it clear that neither the Union nor its supporters had damaged the box as an act of harassment, and Respondent's continued references to nonexistent harassment for no good reason shown persuades me that these references were designed to elicit information about union activities and coercively impress on its employees that it was opposed to union activities. The mere coloration of these comments by the application of the term "union harassment," or a variant thereof does not obscure their purpose which was to interfere with and restrain employee union activities, as they reasonably tended to do, in violation of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact and conclusions based thereon, and upon the record as a whole, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, T.R.W. Bearings Division, a Division of T.R.W., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating employees about their union activities, Respondent violated Section 8(a)(1) of the Act.
4. By threatening employees with discharge because of their union activities, Respondent violated Section 8(a)(1) of the Act.
5. By maintaining and distributing its work rules 9 and 12 set forth under the heading "Class A/5 Step Procedure" in its "Employee Guide to standards of good conduct and responsiblitity on the job," Respondent has violated Section 8(a)(1) of the Act.
6. By discharging Laland Anderson in order to discourage union activity and union membership, Respondent violated Section 8(a)(3) and (1) of the Act.
7. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist order and notice posting, my recommended Order will require Respondent to offer Laland Anderson unconditional reinstatement to his former job or to a substantially equivalent position if his former job no longer exists, and to make him whole for all wages lost as a result of his unlawful discharge. Said backpay and interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[15] I shall also recommend that Respondent be ordered to withdraw and abolish its unlawful rules, and notify its employees that it has taken such action.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, T.R.W. Bearings Division, a Division of T.R.W., Inc., Flowery Branch, Georgia, its officers, agents, successors, and assigns, shall:

[13] "The offering of a spurious defense, of course, supports an inference as to the unlawfulness of the real reason," *Grede Foundries, Inc.*, 211 NLRB 710, 712 (1974).

[14] I do not know why the General Counsel considers this incident outside the statutory limitations period. It clearly is not. It was litigated, is fairly encompassed by the subject matter of the charge and the complaint, and is intimately related to Respondent's pattern of conduct leading to Anderson's discharge. *Staco, Inc.*, 244 NLRB 461, 466 (1979).

[15] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[16] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discouraging union activity or membership in the Union, or any other labor organization, by discharging employees or otherwise discriminating against them in any manner with respect to their tenure of employment or any term or condition of employment.

(b) Coercively interrogating employees concerning their union activities.

(c) Threatening employees with discharge because they engage in union activities.

(d) Distributing, maintaining in effect, or enforcing work rules 9 and 12 appearing under the heading "Class A/5 Step Procedure" in its "Employee Guide to standards of good conduct and responsibility on the job."

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Laland Anderson immediate and full reinstatement to his former job, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of earnings he may have suffered by reason of his discriminatory discharge, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Withdraw and abolish its work rules 9 and 12 set forth under the heading "Class A/5 Step Procedure" in its "Employee Guide to standards of good conduct and responsibility on the job," and notify its employees of said withdrawal and abolition in writing.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay due under the terms of this recommended Order.

(d) Post at its Flowery Branch, Georgia, offices and facilities copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized agent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that these notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with this Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their union activities.

WE WILL NOT threaten our employees with discharge because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE HEREBY NOTIFY YOU that we have withdrawn and abolished work rules 9 and 12 set forth under the heading "Class A/5 Step Procedure" in our "Employee Guide to standards of good conduct and responsibility on the job."

WE WILL offer Laland Anderson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest thereon.

All our employees are free to join International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

T.R.W. BEARINGS DIVISION, A DIVISION OF T.R.W., INC.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."